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No. 351

In the Supreme Court of the United States

OCTOBER TERM, 1957

HAROLD PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 244 F. 2d 943. The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1957 (Pet. App. B). A petition for rehearing was denied on July 8, 1957. The petition for a writ of certiorari was filed on August 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a trial for perjury before a grand jury was barred by reason of the fact that petitioner, who had been identified as the conduit of moneys to a police officer, was not warned of his privilege against self-incrimination.

2. Whether it is a defense to perjury that petitioner was not informed of the subject matter of the grand jury investigation.

3. Whether there was error in the trial court's rulings on evidence.

STATEMENT

In a five-count indictment returned in the United States District Court for the Northern District of Illinois, petitioner was charged with perjury before a 1955 federal grand jury (R. 6–10). He was convicted on the first and second counts, and sentenced to concurrent terms of three years in prison and cumulative fines of $1,000 (R. 198–199).[1] On appeal, the conviction was affirmed.

The 1955 grand jury before which petitioner was called was investigating possible income tax evasion as the result of gambling activities in Chicago (R. 38). Petitioner's indictment was based on testimony he gave when summoned pursuant to subpoena on January 20, 1955. He also testified at later hearings in March and August (R. 38).

Inter alia, on January 2, the grand jury asked whether petitioner had been in New York in 1951, in

[1] The third and fifth counts were dismissed on the government's motion (R. 37). Petitioner was acquitted on the fourth (R. 197).

order to determine whether he had met a Claude Murphy there. Petitioner testified that he had not been in New York since 1945, when he was discharged from the army there (R. 7). This testimony formed the basis of count one (R. 6–7). Two witnesses testified for the government that they had seen petitioner in New York in 1951 (R. 118–120). One of petitioner's witnesses, on cross-examination, testified that he had been with petitioner in New York in 1951 (R. 143). Petitioner himself, on his third appearance before the grand jury in August, 1955, had admitted that he had been in New York in 1951, saying that he had misunderstood the question put to him in January (R. 150).

Petitioner was also asked when he knew Claude Murphy, and what the nature of the relationship was. Petitioner testified before the grand jury that he had never formally met Murphy, had seen him for the first time in 1953 in a tavern, and had spoken to him casually thereafter in the tavern or on the street (R. 7). This testimony was the basis of count two (R. 7–8).

Five witnesses introduced by the government testified that petitioner knew Claude Murphy well enough to address him by his first name as early as 1950. They testified that on a number of occasions in 1952 and 1953 they had seen Murphy and the petitioner talking, sometimes with others and often by themselves, in a tavern or on the street (R. 110–117).

Before trial, petitioner moved to dismiss the indictment on the ground that his testimony before the

grand jury on January 20, had been illegally obtained in that he had not been advised of the subject matter of the investigation, and had not been informed of his privilege against self-incrimination, although he was the target of the investigation (R. 12–13).[2] He attached to his motion two articles which had appeared in the Chicago Daily Tribune on January 17 and 20, 1955, the day petitioner was called before the grand jury, both reporting that petitioner was named by Charles Murphy, a convict, as the "man" who collected money from policy operators for a south side police officer (Exhibits A and H to petitioner's motion to dismiss indictment, R. 30). The motion to dismiss the indictment was denied (R. 31). Petitioner's motion for judgment of acquittal, relying in large part on the same contentions, was also denied (R. 182).

In submitting the case to the jury, the judge charged that "[t]he mere possibility that a witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment of the Constitution when summoned to give testimony before a Grand Jury" (R. 189). Petitioner objected to the charge alleging that it was prejudicial because it suggested the possibility of an indictment (R. 197).

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[2] Before his March appearance, petitioner was warned that the grand jury was conducting an investigation of possible tax evasions, that he might be involved, and that he had the privilege to refuse to incriminate himself (Exhibits B and 4-B to petitioner's motion to dismiss indictment, R. 30).

ARGUMENT

1. Petitioner contends (Pet. 18–22) that his prosecution for perjury was barred by reason of the fact that he was not informed of his constitutional privilege against self-incrimination at the time of his appearance before the grand jury, when, he argues, he was the unmistakable target of the investigation. To this argument, there are two answers: (1) petitioner was not the target of the investigation but a witness; (2) the failure to inform him of his privilege, whatever effect such omission might have on an indictment against him with relation to the subject matter of the investigation, did not give petitioner a license to commit perjury and immunity from prosecution for perjury.

a. The evidence of the newspaper articles showing that petitioner had been identified as the collector of money for a police officer, far from showing that petitioner was a target of the investigation, shows that he was not. In the investigation of possible income tax evasions as the result of gambling activities, the ultimate receiver of the money was certainly much more the target of the investigation than the mere conduit of the money. In *United States* v. *Scully*, 225 F. 2d 113 (C. A. 2), on which petitioner relies, the grand jury, before it called Scully in connection with an investigation of frauds in government purchases, knew that Scully had ordered bids to be rigged on twenty occasions and had deposited in his bank account $4,000 more than he earned. Even so, the Court of Appeals, in upholding the district court's denial of Scully's

motion to dismiss an indictment charging him with participation in fraud, found it far from clear that Scully had been marked for prosecution, and ruled, 225 F. 2d at p. 116:

> * * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.

Petitioner was much less clearly marked for prosecution than was Scully.[3]

b. In any event, even if petitioner should have been warned, and even assuming the very debatable position that failure to warn a witness may be a ground for dismissing an indictment against him with relation to the subject matter of the investigation, we think it is clear that, when petitioner did undertake to testify, he had no license to commit perjury and could not acquire immunity from prosecution for his perjury. This Court in *Glickstein* v. *United States*, 222 U. S. 139, 142, held with relation to a statute granting immunity in lieu of the privilege:

> * * * the immunity afforded by the constitutional guarantee relates to the past and does not

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[3] In *United States* v. *Bell*, 81 Fed. 830 (W. D. Tenn.), the witness, when he appeared before the examiner, was definitely the object of the investigation, since the examiner knew that the witness had executed a false pension certificate. *Boyd* v. *United States*, 116 U. S. 616, also cited by petitioner, is wholly inapposite for there, under the statute held unconstitutional, the failure to produce was taken as a confession of guilt, thus in effect imposing a penalty for exercise of the claim of privilege.

endow the person who testifies with a license to commit perjury.

See also *Cameron* v. *United States*, 231 U. S. 710, 720. Similarly, whatever immunity may result from failure to inform a witness as to his privilege, it does not go so far as to excuse deliberate and wilful perjury. *Claiborne* v. *United States*, 77 F. 2d 682 (C. A. 8); *United States* v. *Miller*, 80 F. Supp. 979 (E. D. Pa.); *United States* v. *Cason*, 39 F. Supp. 731 (W. D. La.); see *Glickstein* v. *United States*, 222 U. S. 139; *Wechsler* v. *United States*, 158 Fed. 579 (C. A. 2); *Edelstein* v. *United States*, 149 Fed. 636 (C. A. 8).

The case of *United States* v. *Bell*, 81 Fed. 830 (W. D. Tenn.), upon which petitioner relies to establish the rule that the testimony of a witness uninformed of his constitutional right may not be the basis of an indictment for perjury, has not been followed. See *United States* v. *Thomas*, 49 F. Supp. 547, 551 (W. D. Ky.).

2. Petitioner's contention (Pet. 23–24) that his prosecution for perjury was barred because he was not informed of the subject matter of the investigation, and could not determine what questions were material, is answered by the opinion of this Court in *Blair* v. *United States*, 250 U. S. 273. As this Court there said, at p. 282, "He is not entitled to set limits to the investigation that the grand jury may conduct." A witness may be compelled to testify before a grand jury without being apprised of either the subject matter of the inquiry or the names of the persons against whom the inquiry is addressed. *In*

re Black, 47 F. 2d 542 (C. A. 2); *United States* v. *Neff*, 212 F. 2d 297 (C. A. 3).

Petitioner contends that, by analogy to *Watkins* v. *United States*, 354 U. S. 178, he was entitled to have knowledge of the subject of the grand jury investigation so he could determine the materiality of his testimony (Pet. 23–24). The *Watkins* case dealt with refusal to give testimony before a Congressional investigating committee; the case at hand concerns the affirmative act of perjury in a grand jury investigation. The investigative scope of these two agencies are much different. That difference was recognized by this Court in the *Watkins* case when, speaking of the Congressional investigative power, the Court said, p. 187:

> But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. * * * Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government.

3. There is no merit in petitioner's complaint (Pet. 24–25) that he was accorded inadequate review by the statement of the Court of Appeals that it was leaving "undiscussed, but not unconsidered" various questions raised by petitioner as to rulings on evidence, none of which it found to reach the status of reversible error (Pet. App. B. xvii). None of the contentions urged by petitioner shows error at all.

a. Petitioner was given a list of changes to be made in the transcript of his testimony before the grand

jury, which had been furnished to him pursuant to court order, in order to conform the copy to the stenographic notes (R. 12). During the cross-examination of the four court reporters, petitioner had each point out where the various corrections in the transcript and stenographic notes had been made (R. 40–42, 46–54, 56–73, 87–97). The government objected to the questions concerning changes in the transcript on the ground that these changes had been made before the exhibits were offered into evidence and that as long as the transcript, as offered in evidence, accurately reflected the contents of the stenographic notes, it was immaterial what changes had been made between the time of preparation and the time they were offered in evidence. The court agreed, and sustained the objections (R. 58–60, 61, 64, 65, 69, 72). Also, during the cross-examination of one court reporter petitioner's attorney asked if there was an erasure in her notes over the symbol for "San Francisco" (R. 52). The reporter replied that there had been a penciled note for "San Fran" (R. 52). Petitioner's attorney then asked the reporter if she knew where San Pedro was (R. 53). After the court reporter answered "California or Mexico", the court interrupted the examination and stated that he was not interested in geography (R. 53). The court then restricted the cross-examination by petitioner's attorney to whether the transcript conformed to the stenographic notes (R. 53, 54).

The cross-examination had, at most, only very remote bearing on the statements for which petitioner

was on trial. The limitation was well within the discretion of the trial judge. See *Michelson* v. *United States*, 335 U. S. 469; *Glasser* v. *United States*, 315 U. S. 60.

b. Petitioner's testimony at the later hearings before the grand jury was first put in evidence by the government and then withdrawn on the government's motion before the jury had a chance to see it (R. 84–85). The court instructed the jury to disregard any reference to such exhibits. Petitioner's motion for a mistrial upon the ground that no instruction could be given to the jury which would avoid prejudice was denied (R. 182). The claim of error in this ruling is patently frivolous.

c. The objection that the court erred in striking questions and answers to bring out the fact that petitioner had not been told of his privilege before he testified depends on petitioner's argument that this fact would give him immunity for his perjury. Moreover, Government's Exhibit 1–B, containing the testimony, itself revealed that the advice had not been given.

d. The judge's charge that the possibility of indictment did not require that the witness be warned did not prejudicially suggest that petitioner might be indicted. It was petitioner himself who had wished to show that he was the target of the investigation. Moreover, the judge had previously told the jury that the fact that an indictment had been returned was not evidence nor was the indictment evidence (R. 185–

186). The casual reference to the possibility of some other indictment could not have been prejudicial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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